Case No. 83-43

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1982

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO,

and

OFFICE OF CONSUMERS' COUNSEL,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF OHIO

MOTION OF APPELLEE, OFFICE OF THE CONSUMERS' COUNSEL TO DISMISS APPEAL, OR IN THE ALTERNATIVE, MOTION TO AFFIRM

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STATEMENT OF THE CASE

The issue Appellant seeks to have reviewed has twice previously been presented to this Court. (See, Cleveland Electric Illuminating Company v. Office of the Consumers' Counsel, et al., United States Supreme Court Case No. 81-1002 (February 25, 1982); 71 L.Ed.2d 455 (1982); Cleveland Electric Illuminating Company v. The Public Utilities Commission of Ohio, United States Supreme Court Case No. 82-704 (January 10, 1983), 51 U.S.L.W. 3507 (1983).) The factual situation giving rise to this Appeal has not changed at all from the prior two cases. Appellant once again seeks the opportunity to relitigate issues previously decided in Consumers' Counsel v. Pub. Util. Comm., 67 Ohio St.2d 153, 423 N.E.2d 820 (1981).

The instant appeal arose out of Case No. 81-146-EL-AIR, a proceeding before the

Public Utilities Commission of Ohio. In Case No. 81-146-EL-AIR, the Commission stated with regard to the four terminated units that:

> Applicant has requested an allowance for ratemaking purposes for the amortization of the costs incurred with respect to four cancelled nuclear units. This subject was fully discussed in Cleveland Electric Illuminating Company, Case No. 79-537-EL-AIR, Opinion and Order, July 10, 1980, in which the Commission approved such an amortization. The Commission approved the same amortization in Applicant's subsequent rate case, Cleveland Electric Illuminating Company, Case No. 80-376-EL-AIR , supra, and approved a similar amortization in Ohio Edison, Case No. 80-141-EL-AIR, Opinion and Order, April 9, 1981. The Commission would approve the amortization again if it were not constrained by the decision of the Supreme Court of Ohio in Office of the Consumers' Counsel v. Public Utilities Commission, 67 Ohio St.2d 153 (1981). This case clearly holds that this expense is, as a matter of law in Ohio, not includable as an operating expense for ratemaking purposes. The Commission must, therefore, deny applicant's request.
>
> Re Cleveland Electric Illuminating Company, Case No. 81-146-EL-AIR, Opinion and Order at 28 (March 17, 1982).

The Commission went on, however, to state:

> The Commission believes that the return allowed in this proceeding provides revenues sufficient to provide for amortization of that balance over a reasonable period of time. Accordingly, although we cannot allow an amortization allowance for ratemaking purposes, for book purposes, the applicant is authorized to amortize the balances assignable to the terminated nuclear units over an appropriate period of time, not to exceed 15 years.
>
> Id. at 28.

The Commission in addressing the rate of return stated specifically:

> We are of the opinion that the increase in investors' perceived risk should be reflected in the return on equity granted in this case. Indeed, the Supreme Court in Consumers' Counsel v. Public Utilities Commission, supra, specifically acknowledged that its decision in that case could seriously disadvantage Ohio utilities in the capital markets (Id. at p. 176). As a result, instead of selecting the low point of the Staff's recommended range, we are of the opinion that the first quartile should be utilized.
>
> Id. at 40.

Following the Commission's decision, the Appellant undertook its second appeal of the same issue to the Ohio Court, once again alleging that the Commission's decision in Case No. 81-146-EL-AIR, supra, and the Ohio Supreme Court's decision in Consumers' Counsel v. Public Utilities Commission, 67 Ohio St.2d 153, 423 N.E.2d 820 (1981) was incorrect and violative of the Fifth and Fourteenth Amendments of the U.S. Constitution. The Ohio Supreme Court, in addressing the issues raised by Appellant, stated:

> The question whether the expenditures associated with the four terminated generating stations may be included in test year expenses as allowable operating expenses was addressed by this Court in Consumers' Counsel, supra. In that case we held in the syllabus that:
>
> "The Public Utilities Commission's treatment of a utility's investment in terminated nuclear generating stations as amortizable costs to be recovered from the utility's ratepayers is inconsistent with the ratemaking formula

> contained in R.C. 4909.15 and is unreasonable and unlawful."
>
> In the present case, we are confronted with exactly the same issue arising out of exactly the same facts. We are no more persuaded by appellant's arguments today than we were when they were originally advanced in Consumers' Counsel. We adhere to our position taken in that case for the reasons expressed therein.
>
> Cleveland Electric Illuminating Company v. Public Util. Comm., 4 Ohio St.3rd 107, 108-109 (1983).

The Ohio Court's discussion of constitutional matters was not necessary to its result. The Court's decision in the case below was supported by its reasoning in Consumers' Counsel without the necessity of addressing the constitutional issues raised by Appellant. Cleveland Electric Illuminating Co. v. Pub. Util. Comm., supra at 108-109. Nevertheless, the Court did address the constitutional claim made by Appellant as follows:

> Appellant suggests, however, that such an interpretation of R.C.

4909.15(A)(4) constitutes a confiscation of private property in violation of the Fifth and Fourteenth Amendments to the United States Constitution. We recently addressed this precise constitutional question in Dayton Power & Light Co. v. Pub. Util. Comm. (1983), 4 Ohio St. 3d 91. After a thorough review of the applicable constitutional standards, we determined that R.C. 4909.15(A)(4) does not violate the Fifth and Fourteenth Amendments, stating, at pages 103-106:

"***Pursuant to the statutory ratemaking formula investors are assured a fair and reasonable return on property that is determined to be used and useful, R.C. 4909.15(A)(2), plus the return of costs incurred in rendering the public service, R.C. 4909.15(A)(4), while consumers may not be charged for utility investments and expenditures that are neither included in the rate base nor properly categorized as costs. [Footnote omitted.] We see no constitutional infirmity in the balance thus struck by the General Assembly.

* * *

"***Per se confiscation in a utility rate case may exist as an abstract premise, but the constitutional cases make it clear that a successful challenge must demonstrate that the rate order when reviewed in its entirety falls outside the 'broad zone of reasonableness' [Permian Basin Area Rate Cases (1968), 390 U.S. 747, 770]

and the 'heavy burden' of establishing unreasonableness must be borne by the challenger. [FPC v. Hope Natural Gas Co. (1943), 320 U.S. 591, 602.]

* * *

"***The rule is clear: '***If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry***is at an end.'***" (Emphasis added.) Moreover, the Constitution imposes no methodological strictures on ratemaking authorities. See Dayton Power & Light Co., supra, at page 98, fn. 8.

CEI has not demonstrated that the rate order in its entirety is confiscatory. The commission submits that CEI's failure to do so "precludes a finding of confiscation in this case." The commission specifically adjusted the cost of common equity upward to reflect the perceived increased risk to investors as a result of this court's decision in Consumers' Counsel, supra. See the commission's order in case No. 81-146-EL-AIR, at page 40, and Consumers' Counsel v. Pub. Util. Comm. (1983), 4 Ohio St. 3d 111. This adjustment buttresses the conclusion that the instant order falls within the broad zone of reasonableness. Thus, even if appellant were correct in its assertion that the exclusion based on R.C. 4909.15(A)(4) is improper, there is nothing in the record to suggest that the commission's order, viewed in its entirety,

> would not still be constitutional because "any rate selected*** from the broad zone of reasonableness*** cannot be attacked as confiscatory." Permian Basin Area Rate Cases, supra, at page 770.
>
> Id. at 109-110.

It is from the Ohio Court's rejection of Appellant's constitutional claims that Appellant seeks to perfect the instant appeal.

There are several other brief points Appellee feels compelled to address. First, Appellant implies that it first presented the constitutional questions to the Ohio Supreme Court in its Brief as Intervening Appellee in Consumers' Counsel v. Pub. Util. Comm., 67 Ohio St. 153, 423 N.E.2d 820 (1981). (Appellant's Jurisdictional Statement at 8-9). However, contrary to Appellant's assertion, Appellant did not, in Consumers' Counsel, supra, raise any constitutional issue in its

Brief as Intervening Appellee. Review of this opinion of the Ohio Supreme Court reveals that nowhere was any federal question mentioned, nor was any federal question mentioned in the dissenting opinions in Consumers' Counsel, supra. There was no presentation of a federal question in Consumers' Counsel by Appellant, and the suggestion that a federal question was raised on brief is simply incorrect.

Secondly, Appellee is compelled to take exception with Appellant's description of the consequences of non-recovery. Appellant suggests that there will be a severe financial impact resulting from a write-off of the costs associated with the cancelled plants. Yet, Appellant in its 1979 Annual Report to Shareholders presented a rather different picture than the gloom and doom scenario presented in its jurisdictional statement.

> ...CEI informed its investors in its "1979 Annual Report": "***The Company [CEI] will seek the approval of the Federal Energy Regulatory Commission and the Public Utilities Commission of Ohio for authority to amortize [the costs previously expended toward, the four nuclear units whose construction CAPCO terminated] over a suitable number of years. The extent to which these costs may be recovered through rates will be determined by the PUCO. If any costs of termination are not permitted to be recovered, the Company would be required to reduce Net Income by the disallowed amount. In any event, the resolution of these matters should not have a material adverse impact on the financial position of the Company.
>
> Consumers' Counsel v. Pub. Util. Comm., 67 Ohio St.2d 153, 171, 423 N.E.2d 820 (1981) (Justice Locher, concurring.).

Finally, it should be noted that Appellant was granted an additional increment to the rate of return to reflect the perceived increase in risk flowing from the Ohio Supreme Court's decision in Consumers' Counsel. As such, the consequences of non-recovery, by Appellant's own admission, will "not have a material

adverse impact" upon Appellant's financial position.

MOTION TO DISMISS AND IN THE ALTERNATIVE, MOTION TO AFFIRM

Pursuant to Supreme Court Rule 16.1(b), and 16.1(d), Appellee, Office of the Consumers' Counsel, hereby moves that this Court dismiss the appeal of the Cleveland Electric Illuminating Company as improperly taken from the Supreme Court of Ohio under 28 U.S.C. §1257(2). In the alternative, the Office of the Consumers' Counsel moves that this Court affirm the decision of the Supreme Court of Ohio rendered in the case below.

ARGUMENT IN SUPPORT OF MOTION TO DISMISS

This is the third time in a two year period that Appellant has attempted to invoke the jurisdiction of this Court with

respect to the same issue under 28 U.S.C. §1257(2), which states in pertinent part:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution treaties or laws of the United States, and the decision is in favor of its validity.
>
> * * *

The express language of 28 U.S.C. §1257(2) requires that the highest court of a state render a decision favoring the validity of a state statute before review of the state court decision may be sought in the Supreme Court of the United States.

In 1981, Appellant, appealing from the decision of the Ohio Supreme Court in Consumers' Counsel v. Pub. Util. Comm., 67 Ohio St. 2d 153, 423 N.E. 2d 820 (1981),

presented the following questions to this Court:

QUESTIONS PRESENTED

1. May the State of Ohio, by statute, constitutionally require a public utility to invest its capital to provide adequate service for the convenience of the public in the future and simultaneously prohibit, by statute, the utility from recovering through rates such capital when prudently invested?

2. May the State of Ohio, by statute, constitutionally prohibit a public utility from recovering through rates its capital, prudently invested for the convenience of the public where the undisputed facts show that the utility, and its investors, have never been compensated through the authorized or achieved rate of return for the risk of exclusion of such cost from rates?

This Court dismissed that appeal "for want of a properly presented federal question." The Cleveland Electric Illuminating Company v. Office of Consumers' Counsel, et al. United States Supreme Court Case No. 81-1002 (February 25, 1982), 71 L. Ed. 2d 455 (1982).

In 1982, following the Ohio Court's summary dismissal of an appeal to it on the same issue with the same facts, Appellant again appealed to this Court, presenting the same questions a second time:

QUESTIONS PRESENTED

1. May the State of Ohio, by statute, constitutionally require a public utility to invest its capital for the convenience of the public to provide adequate service in the future and simultaneously prohibit, by statute, that utility from recovering through rates such capital when prudently invested?

2. May the State of Ohio, by statute, constitutionally prohibit a public utility from recovering through rates its capital, prudently invested for the convenience of the public, where the undisputed facts show that the utility, and its investors, have never been compensated through the authorized rate of return for the risk of exclusion of such cost from rates?

The second appeal, like the first, was dismissed by this Court "for want of a properly presented federal question." The Cleveland Electric Illuminating Company v.

The Public Utilities Commission of Ohio, United States Supreme Court Case No. 82-704 (January 10, 1983), 51 U.S.L.W. 3507 (1983).

In this appeal, again on the same issue with the same facts, Appellant presents the following question to the Court:

QUESTION PRESENTED

> May the State of Ohio, by statute, constitutionally require a public utility to invest its capital for the convenience of the public to ensure reliable service in the future and simultaneously prohibit, by statute, that utility from recovering through rates such capital when prudently invested? (Appellant's Jurisdictional Statement, p. i).

It is believed that the second question was omitted in this appeal because the adjustment made in the case below by the Public Utilities Commission to the authorized rate of return to account for any

increase in investor-perceived risk associated with the cancelled plants has effectively silenced that complaint. It is interesting to note that, having twice claimed to this Court a constitutional right to explicit rate of return recognition for the cancelled plants, and having finally received it from the Ohio Commission in the case below, Appellant itself offered expert testimony in its subsequent rate case that such explicit recognition was unnecessary because of the rate of return methodology traditionally employed by the Ohio Commission. (Appellant's Appendix, p. 134). Regardless, this is the third time this Court has been asked to review the same question related to the same issue based on the same facts.

Rule 15.1(a) of the Rules of the Supreme Court of the United States (28 U.S.C.A., U.S. Sup. Ct. Rule 15) requires

that a jurisdictional statement contain the questions to be presented by the appeal. Many decisions have labeled a Jurisdictional Statement as the indicator of what issues the Supreme Court has decided in a summary disposition. Mercado v. Rockefeller, 502 F.2d 666 (2d Cir. 1974), cert. denied, 420 U.S. 925 (1975). Appellee submits that this Court has already disposed of the question submitted in this appeal by its dismissal in Case Nos. 81-1002 and 82-704.

Furthermore, this Court has ruled on numerous occasions that summary affirmances and dismissals without doubt reject the specific challenges presented in the Statement of Jurisdiction. Mandel v. Bradley, 413 U.S. 173 (1977). This Court, in its Per Curiam opinion on the constitutionality of Maryland's Election Code, emphasized that summary actions should not

be understood as breaking new ground, but as applying principles established by prior decisions to the particular facts involved. This Court further indicated that summary affirmances and dismissals prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided in the cases summarily dismissed. Mandel v. Bradley, supra.

Since the question presented here is identical to those presented in the two previous CEI appeals, it follows, pursuant to Mandel, supra, that the prior decisions are dispositive of the issue presented in this appeal.

Moreover, it is equally clear that a summary disposition either by affirmance or by dismissal is a disposition on the merits and need not be reconsidered by the Court. Hicks v. Miranda, 422 U.S. 332

(1975). Appellant has had its day in court, and has been unsuccessful. Appellant, having failed to obtain this Court's review of a claimed federal question in its two previous appeals, cannot revive its already unsuccessful arguments in a subsequent appeal on the same issue with the same facts. The summary dismissal of the issues presented in Case Nos. 81-1002 and 82-704 are, therefore, dispositive of the issue presented herein.

It is also clear that relitigation of the identical facts on grounds either previously presented or grounds Appellant failed to present in a proper and timely fashion is barred by the doctrine of res judicata.

The doctrine of res judicata operates to bar repetitious suits involving the same cause of action. The doctrine is based upon considerations of economy of

judicial time and public policy favoring the establishment of certainty in legal relations. Sea-Land Service v. Gaudet, 414 U.S. 573, 578-579 (1974). This Court has also previously noted that res judicata is founded upon "the generally recognized public policy that there must be some end to litigation and that when one appears in Court to present his case, is fully heard, and the constituted issue is decided against him, he may not later renew the litigation in another Court." Heiser v. Woodruff, 327 U.S. 726, 733 (1946).

While the instant appeal may have grown from an Ohio Supreme Court decision separate and distinct from the one from which Appellant took its first appeal to this Court, Appellant raises issues herein which have already been considered and disposed of in the previous two appeals.

The Ohio Court agrees:

> In the present case, we are confronted with exactly the same issue arising out of exactly the same set of facts. We are no more persuaded by appellant's arguments today than we were when they were originally advanced in Consumers' Counsel. We adhere to our position taken in that case for the reasons expressed therein.
>
> Cleveland Elec. Illum. Co. v. Pub. Util. Comm., 4 Ohio St. 3d 107 at 108-109, 447 N.E.2d 746 (1983). (Emphasis added).

It is that language of the Ohio Court which indicates clearly that the basis for its decision is no different from that in Consumers' Counsel from which Appellant originally appealed. The fact that the Ohio Court gratuitously included a discussion of constitutional matters cannot change the meaning of its express language that the basis for its decision is limited to its interpretation of Ohio ratemaking law as found in its discussion in Consumers' Counsel.

It is apparent that Appellant had the opportunity to present its constitutional arguments, as an Intervening Appellee, both to the Public Utilities Commission of Ohio and the Ohio Court, in Consumers' Counsel, supra. Appellant is now, through this third appeal, seeking to present an argument which was not made in a timely manner in Consumers' Counsel.

This Court was faced with a similar situation in Grubb v. Pub. Util. Comm., 281 U.S. 470 (1930). In Grubb this Court stated:

> In his bill the appellant assails the validity of the order upon one ground not brought to the attention of the state court - a ground arising out of the granting to another interstate motor line of a certificate to operate busses over a route including the loop at Portsmouth; and he insists that this ground of objection is not con-

cluded by the judgment of the state court, and therefore is open to examination and adjudication upon its merits by the district court. But the judgment has a broader operation as res judicata than is thus suggested. The certificate referred to was granted several months before the appellant applied for a certificate and he had personal knowledge of it from the time it was granted. It was shown upon the records of the commission and was easily accessible when the hearing was had upon his application. Thus it is a matter which, if having the bearing now suggested, could have been brought to the attention of the commission either at that hearing or in his request for a rehearing (543, General Statutes); and, if it was not then given proper effect, he could have brought it to the attention of the state court and have made the same claim in respect of it that is now made in his bill.

The thing presented for adjudication in the case in the state court was the validity of the order, and it was incumbent of the appellant to present in support of his asserted right of attack every available ground of which he had knowledge. He was not at liberty to prosecute that right by piecemeal, as by presenting a part only of the available grounds and reserving others for another suit, if failing in that.

> As the ground just described was available but not put forward, the appellant must abide the rule that a judgment upon the merits in one suit is res judicata in another where the parties and subject-matter are the same, not only as respects matters actually presented to sustain or defeat the right asserted, but also as respects any other available matter which might have been presented to that end.
>
> Grubb, supra, at 478-479. (Emphasis added).

The question here is, when the state court opinion appealed from is based solely on a state ground articulated in an earlier decision, can Appellant now claim a federal question so as to invoke this Court's jurisdiction? Certainly not.

The Ohio Court made it clear that its earlier decision and its decision in the matter sub judice was strictly limited to a construction of Ohio Rev. Code §4909.15(A)(4), which defines allowable operating expenses as a component of the ratemaking formula set out in Ohio law.

The question decided by the Ohio Court was precisely articulated by it:

> Notwithstanding the provisions that impose a duty on utility companies to plan for the future, the question under R.C. 4909.15(A)(4) remains whether the cancelled plant expenditures represent "[t]he cost to the utility of rendering the public utility service for the test period."
>
> Consumers' Counsel v. Pub. Util. Comm., 67 Ohio St. 2d 153, 163-164, 423 N.E.2d 820 (1981).

The Court's answer to that question was likewise narrowly limited:

> It is our opinion that R.C. 4909.15(A)(4) is designed to take into account the normal, recurring expenses incurred by utilities in the course of rendering service to the public service to the public for the test period.
>
> * * *
>
> The extraordinary loss sustained by CEI in connection with the terminated nuclear plants cannot be transformed into an ordinary operating expense pursuant to R.C. 4909.15(A)(4) by Commission fiat.
>
> * * *
>
> The Commission's characterization of the investment in the four terminated

> plants as "costs" under R.C. 4909.15(A)(4) in light of what we perceive to be the legislative intention underlying the section is unreasonable. Therefore, to the extent that the commission's order in regard to the cancelled plants is predicated on R.C. 4909.15(A)(4), the order cannot stand.

Consumers' Counsel, supra at 164.

The reasoning of the Ohio Court in Consumers' Counsel on which it based its decision in the case below does not address a federal question, but rather relies solely on state grounds. Appellant seeks to address the same issue on a ground available to it, but not put forward for the Court's consideration, in Consumers' Counsel. The issue is the same; the parties are the same; and the facts are the same. Having failed to persuade the Ohio Supreme Court through its arguments in Consumers' Counsel, and this Court in Case No. 81-1002, as well as Case No. 82-704, the Appellant now wishes the

same parties to relitigate the same issue based upon the same facts.

The appropriate question is how many times must we reargue the question. This Appellee most strenuously objects to a piecemeal approach to litigation. Appellant had a prior opportunity to present its arguments on the identical facts presented in the proceeding sub judice and apparently chose not to do so. The doctrine of res judicata compels dismissal.

Even if res judicata were not applicable here to bar a federal claim by Appellant, the fact that the Ohio Court's decision is supported by adequate state grounds precludes review by this Court. It is well settled that the decision of a state court supported by adequate and independent state grounds will not be resolved by the United States Supreme Court. Henry v. Mississippi, 379 U.S. 443

(1965). The reliance of the Ohio Court in the matter sub judice on the state grounds enunciated in Consumers' Counsel precludes review by this Court:

> Before we may undertake to review a decision of the court of a State it must appear affirmatively from the record, not only that the federal question was presented for a decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause. Lynch v. New York, 293 U.S. 52, 54, 55 S. Ct. 16, 17, 79 L. Ed. 191, and cases there cited.
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> Honeyman v. Hanan, 300 U.S. 14,18; 57 S. Ct. 350, 352 (1937). (Emphasis added).

Furthermore, even where both state and federal questions are decided by the state court:

> It is, of course, a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, even when those judgments also decide federal questions.
>
> Henry v. Mississippi, supra at 446.

The justification for the adequate state ground rule has been explicitly stated by this Court:

> The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not revise opinions.
>
> Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945).

Not only was the case below not decided on the basis of federal questions, the claimed conflict between state law and the Federal Constitution simply does not exist. The Ohio Court did not scrutinize the entire Ohio statutory ratemaking formula in this case. The Ohio Court only reviewed the construction of Ohio Rev. Code §4909.15(A)(4) which defines proper

operating expenses for ratemaking purposes. The mere exclusion of a cost from allowable operating expenses does not per se render the rates confiscatory. This Court has stated:

> Under the statutory standard of "just and reasonable" it is the result reached not the method employed which is controlling.
>
> Federal Power Comm. v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944).

This Court, in discussing the duties of the Federal Power Commission in setting rates, has defined just and reasonable rates as those:

> which will be sufficient to permit the company to recover its cost of service and a reasonable return on its investment.
>
> FPC v. United Gas Pipe Line Co., 386 U.S. 237, 243 (1967). (Emphasis added).

All that has been determined by the Ohio Court is that the costs of cancelled

plants are not a cost of service. The return authorized was adjusted upward specifically to recognize the effects of the Court's decision on the risk perceived by investors. Cleve. Elec. Illum. Co., supra at 109. The exclusion of one cost from allowable operating expense does not automatically render rates resulting from the application of the Ohio ratemaking scheme in conflict with the constitutional standards enunciated by this Court.

It is clear, therefore, that this Court is faced with nothing more than what it faced in Appellant's two previous appeals. The issue is the same; the facts are the same; the parties are the same; and the basis for the decision of the Ohio Court is the same. This Court has already disposed of the issue twice; further appeal is barred by res judicata; adequate state grounds support this, as well as the

previous, decision; and no conflict exists between state law and federal Constitution. It is respectfully requested that this Honorable Court dismiss this appeal.

ARGUMENT IN SUPPORT OF MOTION TO AFFIRM

Appellant has sought to blend several concepts into one argument. However, in so doing, Appellant has failed to grasp one essential problem with its position. The hurdle Appellant must overcome was set out quite distinctly and clearly by the Ohio Supreme Court in Dayton Power & Light Co. v. Pub. Util. Comm., 4 Ohio St.3rd 91, 447 N.E.2d 733 (1983). That problem is to determine whether the expenses associated with the cancelled nuclear plants are allowable operating expenses. The question raised, i.e. whether the costs are recoverable is one which rests upon state law,

as the Ohio Supreme Court correctly pointed out:

> "it is not the Uniform System of Accounts which governs public utility ratemaking, but rather the Ohio Revised Code."
>
> Dayton Power & Light Co., supra at 104.

The question of whether the costs are includable for ratemaking purposes is one which is governed by Ohio law and, in particular, Ohio Rev. Code §4909.15(A)(4).

In Consumers' Counsel, the Ohio Supreme Court specifically limited its decision to "whether the cancelled plant expenditures represent '[t]he cost to the utility of rendering the public utility service for the test period.'" Consumers' Counsel, supra at 153. The Ohio Court strictly limited its determination to what costs appropriately fall within the meaning of Ohio Rev. Code §4909.15(A)(4). In Cleveland Electric Illuminating Company v.

Pub. Util. Comm., 4 Ohio St. 3rd 107 (1983), the Ohio Court, once again presented with the question of the includability of cancelled plant costs as allowable operating expenses, stated:

> The question whether expenditures associated with the four terminated nuclear generating stations may be included in test year expenses as allowable operating expenses was addressed by this court in Consumers' Counsel, supra. In that case we held in the syllabus that:
>
> "The Public Utilities Commission's treatment of a utility's investment in terminated nuclear generating stations as amortizable costs to be recovered from the utility's ratepayers is inconsistent with the ratemaking formula contained in R.C. §4909.15 and is unreasonable and unlawful."
>
> In the present case, we are confronted with exactly the same issue arising out of exactly the same set of facts. We are no more persuaded by appellant's arguments today than we were when they were originally advanced on Consumers' Counsel. We adhere to our position taken on that case for the reasons expressed therein.

> Cleveland Electric Illuminating Company v. Pub. Util. Comm., supra at 108-109. (Emphasis added).

The question presented to the Court in Consumers' Counsel involved the interpretation of Ohio Rev. Code §4909.15(A)(4).

> ...the question under R.C. §4909.15(A)(4) remains whether the cancelled plant expenditures represent "[t]he cost to the utility of rendering the public utility service for the test period."
>
> Consumers' Counsel, supra at 163-164.

The court went on to interpret Ohio Rev. Code §4909.15(A)(4) as follows:

> It is our opinion that R.C. §4909.15 (A)(4) is designed to take into account the normal recurring expenses incurred by utilities in the course of rendering service to the public for the test period.
>
> Consumers' Counsel, supra at 164.

Hence, it is clearly apparent that the decision below was derivative of the plain meaning of the statute's language. CEI

investors have no statutory right to recover their investment through amortization as service-related costs, when that "investment*** never provided any service whatsoever." Id. In reaching this holding, the Ohio Supreme Court was fairly interpreting the law of the State of Ohio. This Court should affirm the Ohio Court's decision as the United States Supreme Court has stated that state "courts have the final authority to interpret and where they see fit to reinterpret [their] state's legislation. Garner v. Louisiana, 368 U.S. 157, 169 (1961).

Where both federal and state questions have been decided by the state court, "[it] is, of course, a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, even when those judgments also decide federal

questions." Henry v. Mississippi, 379 U.S. 443, 446 (1965). The rationale for the adequate state ground rule was recently reiterated by this Court in Zacchini v. Scripps-Howard Broadcasting Co.:"[O]ur only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights." 433 U.S. 562, 566 (1977).

The Ohio Court simply re-affirmed its prior decision handed down in Consumers' Counsel. The Court's decision to address the constitutional claims presented by Appellant in no way serves as a basis for the Ohio Court's decision. Rather, the Ohio Court's decision in Consumers' Counsel re-affirms the adequate state grounds for the Court's decision. Simply put, the decision below hinged upon the definition of the word "cost" as found in Ohio Rev. Code §4909.15(A)(4). The interpretation

neither presents a federal question nor gives rise to one. The disposition of the issue involves nothing but state law.

Appellant further argues that its property, meaning the investment in the terminated nuclear plants, has been confiscated in violation of the Fifth and Fourteenth Amendments to the United States Constitution. In support of this contention, the Appellant directs this Court's attention to Bluefield Water Works Co. v. Public Service Commission, 262 U.S. 679 (1923). Bluefield mandates that "a public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public." 262 U.S. at 692-93. (Emphasis added.) As this Court noted in Bluefield:

> Rates which are not sufficient to yield a reasonable return on the value of the property used, at the time it

> is being used to render the service, are unjust, unreasonable, and confiscatory, and their enforcement deprives the public utility company of its property in violation of the 14th Amendment.

Id. at 290 (Emphasis added).

The investment in the cancelled plants was never used to render service to the public. Ohio Rev. Code §4909.15(A)(4), as interpreted by the Ohio Supreme Court, establishes this same rule for the fixation of a public utility's operating expenses. Ohio law, in accord with Bluefield, provides for the implementation of rates based upon property used to render service to the public. In this case, the Ohio Court found that this investment was not even related to property which provided service to Appellant's customers. Consumers' Counsel, 67 Ohio St.2d at 164, 423 N.E.2d at 827. Thus, the Appellant's property has not been confiscated within

the meaning of Bluefield and the Fifth and Fourteenth Amendments.

The vital, yet unstated, premise in the Company's argument that its property has been unconstitutionally confiscated is that the "property" is the Company's investment in the cancelled projects. This view has its roots in Mr. Justice Brandeis' dissenting opinion in Pacific Gas & Electric Co. v. San Francisco, 265 U.S. 403 (1924). The federal courts have "recognized, however, that Justice Brandeis' formula for ascertaining rate base--the amount of capital prudently invested--was not to become the prevailing rule." NEPCO Municipal Rate Committee, v. FERC, 668 F.2d 1327 (D.C. Cir. 1981). Appellant's investment was related to property that never provided utility service to the public, and, whether or not this

investment can be characterized as "property", which is doubtful, it is a cost that cannot lawfully be recovered from the Company's customers.

What Appellant seeks is for this Court to hold, as a matter of law, with no regard for the overall rate relief granted, that the denial of recovery of the costs associated with the four terminated units results in the confiscation of Appellant's property. Such a decision would run contrary to the admonition set out in Federal Power Commission v. Natural Gas Pipeline Company, 315 U.S. 575 (1942):

> The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances. Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear

> showing that the limits of due process have been overstepped. If the Commission's order as applied to the facts before it and viewed in its entirety, produces no arbitrary result, our inquiry is at an end.

Id. at 586. (Emphasis added).

The Ohio Court specifically reviewed the order of the Commission and found that:

> there is nothing in the record to suggest that the commission's order, viewed in its entirety, would not still be constitutional because "any rate selected*** from the broad zone of reasonableness*** cannot be attacked as confiscatory.

Cleveland Electric Illuminating Company v. Pub. Util. Comm., supra at 110.

The Ohio Court did nothing less than follow the guidelines set out by this Court in Natural Gas Pipeline Company which was subsequently affirmed in Federal Power Commission v. Hope Natural Gas Company, 320 U.S. 591 (1944) wherein the Court stated:

> when the Commission's order is challenged in the courts, the question is

> whether that order "viewed in its entirety" meets the requirements of the act...under the statutory standard of "just and reasonable" it is the result reached not the method employed which is controlling. ...It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable judicial inquiry under the Act is at an end.... And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences.

Id. at 602. (Emphasis Added).

The inclusion or exclusion of an item does not, in and of itself, render the decision of the Ohio Court confiscatory. The whole order must be viewed in its entirety. In such a context, the decision appealled from does not result in an unconstitutional confiscation of property. The exclusion of cancelled plant costs from includable expenses for ratemaking purposes does not, by itself, give rise to a claim of confiscation.

Finally, the Court's discussion of the ratemaking process in Hope Natural Gas Co., need be recalled.

> The ratemaking process under the Act, i.e., the fixing of "just and reasonable" rates, involves a balancing of the investor and the consumer interests.
>
> Thus we stated in the Natural Gas Pipeline Co. case that "regulation does not insure that the business shall produce net revenues." 315 U.S. p. 590, 86 L.Ed. 1052, 62 S Ct 736. But such considerations aside, the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operation expenses but also for the capital costs of the business... That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital. ...

Hope Natural Gas Co., supra at 603.

Two points need be made. First, the Ohio ratemaking formula provides just such a balancing of the interests of the investor and the consumer. As the Ohio

Court stated in Dayton Power & Light Co. v. Pub. Util. Comm., supra;

> Under the ratemaking formula now in effect consumers are not chargeable for utility investments and expenditures that are neither included in the rate base nor properly categorized as costs. What we previously stated in a rate base case is applicable to the case at bar: '***It is only proper that their [the investors'] venture be found operational before they commence to recoup their capital outlays from the consumers.' Consumers' Counsel v. Pub. Util. Comm. (1979), 58 Ohio St. 2d 449, 456-457 [12 O.O.3d 378].
>
> In Consumers' Counsel v. Pub. Util. Comm., (1979), 58 Ohio St. 2d 449 [12 O.O.3d 378] (hereinafter "Toledo Edison"), this court held that the Davis-Besse Unit 1 generating station, which was not "used and useful in rendering the public utility service" pursuant to R.C. §4909.15(A)(1), could not be included in the utility's rate base.
>
> * * *
>
> While we again note that Toledo Edison involved rate base consideration under 4909.15(A)(1), as opposed to matters relating to cost of service under R.C. §4909.15(A)(4), the analogy is a fair one insofar as it indicates that the General Assembly has adopted

> a consistent position in balancing investor and consumer interests in utility ratemaking. Pursuant to the statutory ratemaking formula investors are assured a fair and reasonable return on property that is determined to be used and useful, R.C. §4909.15(A)(2), plus the return of costs incurred in rendering the public service, R.C. §4909.15(A)(4), while consumers may not be charged "for utility investments and expenditures that are neither included in the rate base nor properly categorized as costs." We see no constitutional infirmity in the balance thus struck by the General Assembly.
>
> Id. at 102-103.

Second, the financial integrity of the Appellant is not in any way effected by the Ohio Court's decision and possible write-off, as Appellant so readily acknowledged in its 1979 Report to Shareholders:

> If any costs of termination are not permitted to be recovered, the Company would be required to reduce net income by the disallowed amount. In any event, the resolution of these matters should not have a material adverse impact on the financial position of the Company.

Consumers' Counsel v. Pub. Util. Comm., supra at 171. (Emphasis added).

The strictures set out in Hope Natural Gas Co., have been adhered to. There is no confiscation.

Finally, Appellee is compelled to address one final line of argument set out by Appellant. Appellant suggests that Washington Gas Light Co. v. Baker, 188 F.2d 11 (D.C. Cir. 1950), Cert. denied 340 U.S. 952 (1951) is "closely analogous" to the situation presented in the case sub judice.

Such is most certainly not the case. Washington Gas Light dealt with a situation wherein a plant used in the manufacture of gas was abandoned prior to full recovery through depreciation due to a switch to natural gas. Prior to abandonment, the plant in question was used in providing service. This is perhaps the

most important distinction noted by the Court in discussing this particular aspect:

> If a unit of property resulting from prudent investment becomes obsolete before it has been recovered in full by the investor (either through annual depreciation charges or through returns sufficient to compensate for such inadequacy), it is not necessarily erroneous as a matter of law for the Commission to include it in the rate base until such recovery has occurred....
>
> But inclusion in the rate base must meet the test of justness and reasonableness to the consumers as well as to the investor.
>
> Id. at 19.

This distinction was recognized by the District of Columbia Court of Appeals in NEPCO Municipal Rate Committee v. FERC, supra, wherein the Court, in addressing the argument that property prudently invested should be included in rate base, stated:

> Similarly, nothing in Washington Gas Light Co. v. Baker, supra, or Democratic Natural Committee v. Washington Metropolitan Area Transit Commission,

> supra, conflicts with FERC's decision on this case. Those cases involved property used and retired from service before investors had been fully compensated. Neither case involved the issue presented here--how expenditures should be allocated when a project is cancelled before any use of the facility begins.
>
> Id. at 1334.

In the instant case, the expenditures never provided any service. Appellant seeks to totally insulate investors from any risk. The Ohio Court has done nothing more than properly allocate the risk associated with cancellation in accordance with Ohio law.

The decision by the Ohio Supreme Court in Cleveland Electric Illuminating Company v. Pub. Util. Comm. did nothing more than adhere to the Court's previous decision in Consumers' Counsel. The decision in the first instance rests solely upon adequate

state grounds. Secondly, the decision taken as a whole was not so unjust and unreasonable as to result in the confiscation of Appellant's property. Therefore, this Court should affirm the decision of the Ohio Supreme Court in Cleveland Electric Illuminating Company v. Pub. Util. Comm.

CONCLUSION

The instant appeal is nothing more than a third attempt to present the identical question which has twice previously been brought before this Court, arising out of the same facts. This Court's prior dispositions, as well as the doctrine of res judicata compel dismissal. Further, the decision by the Ohio Supreme Court is based upon adequate state grounds. This Court should, therefore, sustain Appellee's Motion to Dismiss this appeal. In

the alternative, Appellee submits that the decision of the Ohio Supreme Court should be affirmed for the reasons set out in Appellee's Motion to Affirm.

Respectfully submitted,

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